UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2008 MSPB 209

Docket No. DC-0752-07-0821-I-1

Judy Lynne Aldridge,

Appellant,

v.

Department of Agriculture,

Agency.

September 10, 2008

John F. Karl, Jr., Esq., Washington, D.C., for the appellant.

Robyne L. Jackson, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision that affirmed her removal. For the reasons set forth below, we GRANT the appellant's petition, VACATE the initial decision, and REMAND for further proceedings consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant was a GS-13 Management Analyst with the agency's Rural Development Bureau. Initial Appeal File (IAF), Tab 5, Subtab 4a. By letter dated August 23, 2004, the appellant's first-line supervisor proposed to remove her for (1) failure to meet due dates and complete assignments, (2) failure to

maintain a regular work schedule, and (3) absence without leave (AWOL). *Id*., Subtab 4d. Prior to the issuance of a decision letter, the appellant retired under a voluntary early retirement program, effective October 15, 2004. *Id*., Subtab 4a. The appellant was at this time 58 years of age, with a service computation date of May 1, 1975. *Id*. She subsequently filed an equal employment opportunity complaint alleging, among other things, that her retirement was a constructive discharge and the result of unlawful discrimination. On June 15, 2007, the agency issued a final agency decision finding no discrimination. *Id*., Subtab 3; IAF, Tab 2.

¶3 The appellant filed a timely appeal, alleging that her retirement was involuntary and the result of the agency's failure to accommodate her allergies and her recovery from brain surgery.[1] IAF, Tab 1. Noting the lack of a written final decision ordering the appellant's removal, the administrative judge (AJ) ordered the appellant to file a copy of the final decision or provide a statement addressing why such a written decision was unavailable. IAF, Tab 3. The AJ further stated that if no final decision on the removal proposal was made prior to the appellant's retirement, he would issue another order directing the appellant to address the question of whether her retirement was voluntary. *Id*.

¶4 In response to the order, the appellant provided a declaration in which she swore, under penalty of perjury, to the following version of events:

> On October 14, 2004, at approximately 3:35 p.m., I was required, in person, by Ms. Sherrie Hinton Henry, my second-line supervisor, to accompany her to the office. When we arrived in her office Ms. Robyne Jackson from Human Resources was already seated. Ms. Hinton Henry invited me to take a seat. She placed a very thick document in front of me and informed me that I was being terminated as of that day. I asked if that meant I would lose my retirement benefits. Both she and Ms. Jackson, almost in unison,

[1] The appellant simultaneously filed a suspension appeal, which was dismissed for lack of jurisdiction. *Aldridge v. Department of Agriculture*, MSPB Docket No. DC-752S-07-0820-I-1 (Initial Decision, Dec. 28, 2007; Final Order, July 1, 2008)

> said, "That is exacting [sic] what it means." I then remarked to Ms. Hinton Henry that she had not offered early retirement in lieu of termination. She countered that I had every opportunity to retire before she made her final decision. (This implied that I knew what her final decision would be.) I replied that I had no intention of making a decision to retire. She then informed me that she would hold her decision in abeyance until Monday, October [18], 2004,[2] for me to sign retirement papers. She threatened that if the retirement papers were not signed by this date, she would issue the termination decision. I asked for a copy of the termination decision and she said if I give you a copy, you will be terminated. I cleared my cubicle that day and presented to Human Resources on Monday, October 18, 2004, and signed the retirement papers in order to preserve retirement benefits I earned over approximately 28.5 years. When I arrived in Human Resources, Ms. Jackson asked, "what's the matter, cat got your tongue." I ignored her comments.
>
> My retirement was forced. Please accept my appeal as an adverse action removal appeal for which the Board has jurisdiction.

IAF, Tab 4.

¶5 Two weeks later, the agency moved to dismiss the appeal for lack of Board jurisdiction. IAF, Tab 5. The agency argued that the fact that the appellant was faced with a choice between retirement and removal did not render her retirement involuntary, and that it had reasonable grounds for proposing her removal. *Id*. It did not dispute any of the appellant's factual assertions. Based on the appellant's unrebutted declaration, the AJ determined that, notwithstanding the lack of a written decision, the appellant had been removed based on the charges set forth in the notice of proposed removal. IAF, Tab 9. He indicated that the agency's motion to dismiss had been taken "under advisement," but would be given no further review absent evidence challenging the statements in the appellant's declaration. *Id*. The AJ did not issue a show-cause order on the issue of voluntariness.

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[2] Due to an apparent typographical error, the declaration reads "October 16, 2004," which was a Saturday.

¶6 Following a hearing on the merits of the removal action proposed in the August 23, 2004 notice, the AJ sustained the first two charges in their entirety and the AWOL charge in part. He further found that the appellant had failed to establish her affirmative defense of disability discrimination, and that the penalty of removal is reasonable and promotes the efficiency of the service. IAF, Tab 19 (Initial Decision, Mar. 3, 2008).

ANALYSIS

The agency did not carry out the proposed removal.

¶7 Contrary to the initial decision, the agency did not remove the appellant based on the charges set out in the proposal notice. It is true that once a decision to remove has been issued, the appellant retains appeal rights even if she separates from the service through retirement. *See* 5 U.S.C. § 7701(j); *Mays v. Department of Transportation*, 27 F.3d 1577, 1579-81 (Fed. Cir. 1994). It is also true that an agency may effect an appealable disciplinary action without issuing the written decision letter required under 5 U.S.C. § 7513(b)(4). In such a case, the agency's failure to issue a written decision constitutes procedural error but does not deprive the Board of jurisdiction. *See Deas v. Department of Transportation*, 108 M.S.P.R. 637, ¶ 12 (2008). In this case, however, the agency neither issued a decision nor effected the appellant's removal.

¶8 In her declaration, the appellant relates that on October 14, 2004, her second-line supervisor orally conveyed her decision to remove her effective immediately. However, she subsequently informed the appellant that this decision was being held in abeyance. The appellant's request for a copy of the written decision was denied, further indicating that the decision to remove was no longer operative. Instead, the appellant was informed that if she did not sign retirement papers by October 18, 2004, her second-line supervisor "would issue" the termination decision. This implies that the second-line supervisor had not yet issued a final removal decision, and that such a decision would be issued only if

the appellant failed to retire before the deadline. The appellant declares that she signed the retirement papers on October 18, 2004, before the time limit expired, and it is undisputed that the agency took no further action.

¶9 Sworn statements that are not rebutted are competent evidence of the matters asserted therein. *Truitt v. Department of the Navy*, 45 M.S.P.R. 344, 347 (1990). Based on the appellant's unrebutted declaration, sworn under penalty of perjury, we find that the agency never made a final decision, written or otherwise, to effect the removal action proposed in its August 23, 2004 notice. Consequently, it was error to address the merits of the proposed action. *See Mays*, 27 F.3d at 1579 (the Board lacks jurisdiction over proposed removals). Rather, this case should be considered as an appeal of an alleged involuntary retirement, as the parties originally contemplated.[3] *See* IAF, Tabs 1 and 5.

The appellant made a non-frivolous allegation that her retirement was involuntary.

¶10 A decision to retire is presumed to be a voluntary act outside the Board's jurisdiction, and the appellant bears the burden of showing by a preponderance of the evidence that her retirement was involuntary and therefore tantamount to a forced removal. *Garcia v. Department of Homeland Security*, 437 F.3d 1322, 1329-30 (Fed. Cir. 2006). Once an appellant makes a non-frivolous allegation casting doubt on the presumption of voluntariness, she has the right to a hearing

[3] On petition for review, the appellant argues that her second-line supervisor improperly considered her past military service as an aggravating factor in determining the penalty that would have been imposed had a final decision been issued. Although it does not relate directly to her alleged involuntary retirement, the appellant's claim of discrimination based on her past military service may fall within the Board's jurisdiction under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). *See* 38 U.S.C. §§ 4311(a) and 4324(c). If she so desires, the appellant may file a separate appeal concerning this matter. There is no statutory time limit for filing an appeal under USERRA. *Tierney v. Department of Justice*, 89 M.S.P.R. 354, 356, ¶ 6 (2001).

on the issue of Board jurisdiction. See id. at 1344. A non-frivolous allegation is an allegation of fact that, if proven, could establish a prima facie case that the Board has jurisdiction over the appeal. *Williams v. Department of Agriculture*, 106 M.S.P.R. 677, ¶ 10 (2007). Hence to establish entitlement to a jurisdictional hearing, an appellant need not allege facts that, if proven, definitely would establish that her retirement was involuntary; she need only allege facts that, if proven, could establish such a claim. *Id*.

¶11 One means by which an appellant may overcome the presumption of voluntariness is by showing that the retirement was obtained by agency misinformation or deception. *Covington v. Department of Health & Human Services*, 750 F.2d 937, 942 (Fed. Cir. 1984). A decision made "with blinders on," based on misinformation or lack of information, cannot be binding as a matter of fundamental fairness and due process. *Id*. at 943. There is no requirement that the employee be intentionally deceived, provided that a reasonable person would have been misled by the agency's statements. *Id*. at 942. That is, the agency could have provided the misleading information negligently or even innocently; if the appellant materially relied on the misinformation to her detriment, her retirement is considered involuntary. *Id*.

¶12 In her declaration, the appellant states that she was informed by her second-line supervisor and a Human Resources specialist that her removal would result in the loss of her retirement benefits. While it was reasonable for the appellant to rely on these sources, the information she allegedly received was incorrect. Had the agency proceeded with the proposed removal action, the appellant would have remained eligible for deferred retirement upon reaching the age of 62. *See* 5 U.S.C. § 8338(a). Moreover, she would have enjoyed the right to appeal the action before the Board. The appellant further relates that she elected early retirement "in order to preserve retirement benefits [she] earned over approximately 28.5 years." IAF, Tab 4. That is, she acted in the mistaken belief that her only options were to retire immediately or face the loss of all

retirement benefits. Based on the appellant's sworn and unrebutted statement, we find that she has made a non-frivolous allegation that her retirement was involuntary.

ORDER

¶13 Accordingly, we REMAND this appeal to the Washington Regional Office for a hearing on the issue of whether the appellant's retirement was the result of agency misinformation and therefore an involuntary act within the Board's jurisdiction. *See Baldwin v. Department of Veterans Affairs*, 2008 MSPB 169, ¶ 33; *Wallendorf v. Department of the Treasury*, 102 M.S.P.R. 59, ¶ 12 (2006).

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.